No. 94-805, 94-806, and 94-988



In the Supreme Court of the United States
OCTOBER TERM, 1995

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GEORGE W. BUSH, Governor of Texas, *et al.*,
*Appellant-Applicants*,

vs.

AL VERA, *et al.*, *Appellee-Respondents*

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REV. WILLIAM LAWSON, *et al.*,
and
ROBERT REYES, *et al.*, *Appellants*,
vs.

AL VERA, *et al.*, *Appellees*.

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UNITED STATES OF AMERICA, *Appellants*,
vs.

AL VERA, *et al.*, *Appellees*.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT*
*FOR THE SOUTHERN DISTRICT OF TEXAS*

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# STATE APPELLANTS' BRIEF ON THE MERITS

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August 1995

## QUESTIONS PRESENTED

1. Whether the trial court properly invoked strict scrutiny where the evidence shows that Texas used its customary and traditional districting principle of incumbency protection in drawing minority opportunity districts to comply with the Voting Rights Act?

2. Whether a consistent state tradition of incumbency protection in congressional redistricting is within the category of traditional districting principles which make strict scrutiny inappropriate under *Miller v. Johnson* if observed in a redistricting plan?

3. Whether the Voting Rights Act and the history of past discrimination against minority voters in Texas that the state seeks to erradicate are compelling state interests?

4. Whether narrow tailoring to meet the compelling interests of compliance with the Voting Rights Act and erradication of past voter discrimination in Texas requires the state to set aside other non-racial traditional districting principles, ignore politics, and draw only those minority opportunity districts conforming to the most idealized possible version of compact shape?

5. Whether the injury-in-fact element of constitutional standing is satisfied in an equal protection redistricting case by plaintiffs who do not claim vote dilution, who are not the object of invidious discrimination by the challenged plan, who have not suffered representational harm, and whose only identified harm is not living in a state whose congressional redistricting plan is designed wholly without race consciousness?

## LIST OF PARTIES

**Plaintiffs**

Al Vera
Edward Chen
Pauline Orcutt
Edward Blum
Kenneth Powers
Barbara L. Thomas

**Defendants**

George W. Bush, Governor of Texas
Bob Bullock, Lieutenant Governor of Texas
Pete Laney, Speaker of the Texas House of Representatives
Dan Morales, Attorney General of Texas
Antonio O. Garza, Secretary of State of Texas

**Defendant-Intervenors**

United States

Rev. William Lawson
Zollie Scales, Jr.
Rev. Jew Don Boney
Deloyd T. Parker
Dewan Perry
Rev. Caesar Clark

League of United Latin American Citizens (LULAC) of Texas
Robert Reyes
Angie Garcia
Robert Anguiano, Sr.
Dalia Robles
Nicolas Dominguez
Oscar T. Garcia
Ramiro Gamboa

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## OPINION BELOW

The Opinion of the three-judge District Court finding unconstitutional Texas Congressional Districts ("CDs") 18, 29, and 30, was entered on August 17, 1994. It is reported as *Vera v. Richards*, 861 F.Supp. 1304 (S.D. Tex. 1994), and is reproduced in the Appendix to the Jurisdictional Statement of the State Appellants (State J.S. App.), at 5a-84a.

## JURISDICTION

On September 2, 1994, the trial court entered an Order requiring the Texas Legislature to develop a remedial plan by March 15, 1995. State J.S. App. 2a. On September 19, 1994, the trial court amended its September 2 Order *nunc pro tunc* to enjoin the use of Texas' congressional districting plan for the 1996 congressional elections. State J.S. App. 4a. The State Appellants filed their Notice of Appeal on September 22, 1994. State J.S. App. 85a. This Court noted probable jurisdiction on June 28, 1995. The Court has jurisdiction of this appeal under the provisions of 28 U.S.C. § 1253.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides:

> . . . nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973c, are set out in State J.S. App. 87a-88a.

## STATEMENT OF THE CASE

Appellees, six Texas voters who were Plaintiffs below, challenged twenty-four of Texas' thirty congressional districts

under the Equal Protection Clause of the Fourteenth Amendment. *See, Vera*, 861 F. Supp. at 1309. The Plaintiffs claimed that Texas illegally used race and ethnicity in constructing these congressional districts and failed to follow what they alleged were "traditional" districting principles. *Id.* After a five day trial, the court below ruled that three districts, CDs 18, 29, and 30, were unconstitutional under the Fourteenth Amendment. *Id.* The court ordered "that the Texas legislature shall develop on or before March 15, 1995, a new Congressional redistricting plan in conformity with this court's previous opinion during the 1995 regular legislative session that convenes on January 10, 1995 . . . ." State J.S. App. at 2a. The court further enjoined the state from conducting the 1996 congressional elections for the state of Texas according to the districts created by the 1991 plan. State J.S. App. at 4a. This Court stayed the trial court's injunction, and, on June 28, 1995, this Court noted probable jurisdiction, thus leaving the stay in effect.

## SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to provide constitutional guidance to states that have created minority opportunity congressional districts in voluntary compliance with the requirements of the Voting Rights Act and in compliance with their own customary and traditional districting practices. At issue in this appeal is the constitutionality of CDs 18 and 30, which are African-American opportunity districts located in the most populous metropolitan areas of Texas, Harris and Dallas Counties, respectively, and CD 29, which is an Hispanic opportunity district in Harris County.

The evidence establishes that the Plaintiffs failed to prove that the Texas Legislature subordinated race-neutral districting principles to racial considerations. In fact, the record establishes quite the opposite; the shapes of these districts resulted from the concern for incumbency protection

and the application of the constitutional doctrine of one-person, one-vote, as well as the desire to make the districts minority opportunity districts.

The trial court understood the predominant role that incumbency protection played in the drawing of all of Texas' thirty districts. Ultimately, it ruled that of the twenty-four districts challenged by the Plaintiffs, only CDs 18, 29, and 30, were unconstitutionally gerrymandered. Although the Legislature drew these districts as opportunity districts in order to comply with the Voting Rights Act, the ultimate shapes of these districts, like those of the other districts that the trial court found constitutional, are due predominantly to battles over constituents that occurred as the lines were being drawn. Therefore, the trial court erred for several reasons.

First, the trial court erroneously invoked strict scrutiny because of its refusal to consider incumbency protection as a traditional race-neutral districting principle. The trial court assumed that only those districting principles expressly referred to in *Shaw v. Reno*, 509 U.S. ___, 113 S.Ct. 2816 (1993), were to be considered traditional. Having rejected incumbency protection as a traditional districting principle, the trial court concluded that race was the predominant factor considered in drawing CDs 18, 29, and 30.

Second, even if the trial court properly invoked strict scrutiny, the state presented sufficient evidence showing that the districts as drawn were narrowly tailored to achieve a compelling state interest. Texas has a compelling state interest in complying with the Voting Rights Act. The record shows that the Texas Legislature only created those minority opportunity districts necessary to comply with § 2 and § 5 of the Voting Rights Act, consistent with the constitutional objective of one-person, one-vote, and consistent with its customary redistricting objective of incumbency protection.

If affirmed, the trial court's judgment means that a state may not apply its own customary and traditional

districting principles if those principles differ from those delineated in *Shaw v. Reno*. Moreover, if affirmed, the trial court's judgment elevates shape to constitutional dimension and contravenes this Court's often stated axiom that "reapportionment is the duty and responsibility of the State." *Miller v. Johnson*, ___ U.S. ___, 115 S.Ct. 2475, 2487 (1995), and cases cited therein. Finally, if affirmed, the trial court's judgment would severely hamper the ability of a state to comply voluntarily with the requirements of the Voting Rights Act.

Texas respectfully requests this Court to reverse the judgment of the trial court and to render judgment in its favor.

## ARGUMENT

The record in this case establishes two facts without dispute. First, when the Texas Legislature redrew election districts after the 1990 census it had as its overriding goal incumbent protection. To the greatest extent possible it intentionally drew congressional, State Board of Education, state Senate, and state House of Representatives districts that preserved the ability of its incumbents of both parties to be reelected. Second, the Legislature decided early in the redistricting process that the three additional congressional seats that Congress reapportioned to Texas after the 1990 census would all be new minority opportunity voting districts to be located in the Dallas, Houston, and South Texas areas. These areas, with significant minority populations and significant minority population growth, have long-standing histories of racially polarized voting and minority underrepresentation. This case presents important questions concerning whether the interplay of these two facts caused Texas to racially gerrymander CDs 18, 29, and 30 in violation of the Equal Protection Clause of the Fourteenth Amendment.

# I.
# THE TEXAS LEGISLATURE DID NOT RACIALLY GERRYMANDER CONGRESSIONAL DISTRICTS

## A. The Trial Court Erred in Invoking Strict Scrutiny

### 1. The Texas Legislature Did Not Rely on Race in Substantial Disregard of Its Customary and Traditional Districting Practices

Two primary objectives impelled the redistricting process that resulted in the creation of Texas' congressional districts: adherence to the constitutional requirement of one-person, one-vote and incumbency protection.[1] A third objective, compliance with the requirements of § 2 and § 5 of the Voting Rights Act, played a lesser, albeit important, role.[2]

The uncontroverted evidence shows that incumbency protection is a traditional districting principle in Texas and was the "prime directive" in this plan. *See,* Joint App. at 246-51. Although other considerations such as compactness and respect for political subdivisions or community lines have

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[1] "Incumbents," in the Texas tradition, included not only sitting members of Congress, but also sitting members of the Texas Legislature who intended to run for open congressional seats: "In each of the new districts we attempted to draw districts that would permit certain candidates who wanted to run to be elected from those districts." U.S. Ex. 1094, House Floor Debate 8/21/91, Joint App. at 371. Thus, Texas' three new congressional districts also had "incumbents": then-State Sen. Frank Tejeda in CD 28, then-State Rep. Roman Martinez and then-State Sen. Gene Green in CD 29, and then-State Sen. Eddie Bernice Johnson in CD 30. These functional incumbents received the same consideration from the Legislature as did the sitting members of the Texas congressional delegation.

[2] Of the thirty congressional districts, nine are majority-minority districts created to satisfy the requirements of the Voting Rights Act.

sometimes also played a role in the process, these other considerations are not required by state law and have always been subordinated to incumbency protection, particularly at the congressional level.[3] *See, White v. Weiser*, 412 U.S. 783, 93 S.Ct. 2348 (1973). Texas has benefited greatly from the seniority of its Congressmen and has gone to great lengths to protect this seniority, even when the cost has been convoluted districts.

Ted Lyon, a former member of both the Texas House and Senate, testified, "[C]ompactness is not a 'traditional redistricting principle' in Texas. For the most part, the only traditional districting principles that have ever operated here are that incumbents are protected and each party grabs as much as it can." *Vera*, 861 F.Supp. at 1313, n. 9. According to Oscar Mauzy, a former Texas Senator and Texas Supreme Court Justice, "Neither pretty districts nor compact districts are a priority in Texas, and they have not been since well before I was involved in districting, if ever." *Id.*[4] The 1991 congressional redistricting plan was but the latest example of this approach.

The trial court correctly noted that Texas did not redraw its congressional districts at all between 1933 and 1957. *Vera*, 861 F.Supp. at 1312. After the 1960 census Texas gained an additional seat in the House of Representatives. Texas "redistricted" by making this additional seat an at-large district. This allowed all incumbents' districts to remain intact. Also in the 1960's, the Legislature created the famous "Tiger" Teague district that ran from Fort Bend County just south of Houston through rural

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[3] Although the Texas Constitution requires that House of Representatives districts cut county lines as little as possible, no such requirement exists with respect to congressional, senatorial, or board of education districts.

[4] The testimony of Lyon and Mauzy is uncontradicted.

east Texas into the southern ends of both Dallas and Tarrant Counties. *Id. See, also,* St. Ex. 41, Joint App. at 336.

In the 1970's, incumbency protection continued to be the primary objective. The trial court noted that the

> . . . 1971 round of Congressional redistricting was notable at least in part because of the great lengths to which the state legislature went to solicit the views of incumbent congressmen. The Senate Congressional Redistricting Subcommittee actually flew to Washington to meet with the Texas delegation as a group and on an individual basis.

*Vera*, 861 F.Supp. at 1312-13. This round of redistricting resulted in a plan that was challenged on one-person, one-vote grounds which this Court ultimately resolved. *White v. Weiser, supra.* In that case, this Court acknowledged the role that incumbency protection had played in the 1971 plan:

> The State asserts that the variances [in population] present in S.B. 1 nevertheless represent good-faith efforts by the State to promote "constituency - representative relations," a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives. We do not disparage this interest.

412 U.S. at 791, 93 S.Ct. at 2352-53 (footnote omitted). Although this Court held that the deviations in population in the 1971 plan could not be justified by this interest, the Court also held that the trial court erred in imposing a remedy that was not consistent with this state policy. The Court repeated

the statement that it had made in *Burns v. Richardson*, 384 U.S. 73, 89 n. 16, 86 S.Ct. 1286, 1295 (1966) concerning legislative redistricting: "The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." *Weiser*, 412 U.S. at 797, 93 S.Ct. at 2357-58.

This tradition of protection of congressional incumbents explicitly played a crucial role in the plan adopted in 1991. For example, during floor debate in the Texas House of Representatives, Tom Uher, the chairman of the House Redistricting Committee, explained that the committee

> . . . tried to recognize the value that each congressman has given to us.
>
> Because of the flexibility that we had due to the fact that we had three additional seats, we were able to try to design districts that would recognize each incumbent and how that incumbent might be able to win in a district, having a reasonable chance to win in that district. In each of the new districts, we attempted to draw districts that would permit certain candidates who wanted to run to be elected from those new districts. So the flexibility has been built into the plan to recognize the overall contribution that each member of the delegation has provided.

U.S. Ex. 1094, House Floor Debate 8/21/91, Joint App. at 370-71. Opposing attempts to make major changes to the committee's plan, Rep. Uher said:

> The approach that we've tried to take with the plan that we've debated all day is to recognize a value that each congressman that we have

> contributes to the economy of this State and to your local area. And we've worked very hard.
>
> I have met with almost every congressman that sits in Washington that represents all of us. And it's very important that we keep a congressional delegation that is effective and influential in Washington.
>
> * * *
>
> We have avoided partisanship throughout this plan, and I know it hasn't satisfied some people, but the plan we have drawn reflects the value and the contributions that each of our congressman have given to this State over many years of dedicated service.

*Id.*, Joint App. at 372-73.

Even opponents of the plan recognized the degree to which incumbency protection had shaped the districts. Republican Rep. Ogden said:

> . . . in order to protect an incumbent Dallas congressman and an incumbent Houston congressman, county lines were not respected, urban boundaries were not respected, precinct boundaries were not respected--in fact, the only thing that doesn't appear to be split in my home town is households.
>
> This sad story is repeated all over the state.

*Id.*, Joint App. at 374-75. Republican Rep. Grusendorf argued:

> Communities throughout the State are surgically split in what appears to be illogical, irrational and erratic patterns. But if you look at election result data throughout the State, you'll find that these lines are very logical and very rational. The lines have been drawn, dissecting communities very creatively in order to pack Republicans and maximize Democratic representation.
>
> * * *
>
> It has been said that the primary reason for the adoption or the drafting of this plan is to protect incumbents. I don't have a problem with protecting incumbents; but I think protection should center around keeping their communities of interest together, keeping their congressional districts compact, and maintaining their current constituencies, not packing one party or another in order to draw noncompetitive districts so that they've got sure reelection opportunities.

*Id.*, Joint App. at 376-77. He continued his criticism with these comments:

> The meandering of districts in this plan reaches new heights of blatant gerrymandering. Many of the districts in this plan may be fairly referred to as uncouth, tortuous and bizarre. The idea of compactness has been totally abandoned and thrown out the window when it conflicts with partisan advantage.

*Id.*, Joint App. at 379. Similar comments were voiced by Republican Rep. Hill concerning the district lines in Dallas

County. *Id.*, House Floor Debate 8/25/91, Joint App. at 383-84.[5]

These comments from the legislative debates were echoed at trial by the Plaintiffs' witness, Rep. Grusendorf, concerning the ultimate shape of districts in the Dallas-Fort Worth area: "The driving force for the crazy lines that you find in North Texas are an attempt to save Martin Frost." Tr. Vol. I at 81.

Clearly, legislators from both parties understood that incumbency protection was the goal embodied in this plan. As critics of the plan pointed out, incumbency protection was the major cause of the irregular shapes of districts in all parts of the state. Other factors contributed to this effect.

Technological advances during the 1980's made possible a degree of precision in the drawing of legislative districts that was not formerly possible.[6] With the level of sophistication in computer resources now available, Texas was able to draw thirty congressional districts with no variation in population. According to the 1990 census, each of the thirty districts had 566,217 people living in them. However, achieving absolute zero deviation had a cost. District lines cannot both be regular and maintain absolute equality of population. Tr. Vol. I at 43. Inevitably, the quest for no deviation made easier by this technology results in irregular boundaries between districts.[7]

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[5] These criticisms led to legal claims when Republican plaintiffs challenged this plan, in part, as a partisan gerrymander. *Terrazas v. Slagle*, 821 F.Supp. 1162 (W.D. Tex. 1993). However, at trial, the plaintiffs lost on this claim. *Id.* at 1172-75.

[6] One witness described the legislative use of this new technology as being like "kids with a new toy." St. Ex. 15, Statement of Paul Colbert, Joint App. at 255. He also noted that given the extremely short time that census data was available before the end of the legislative session, little effort was made to smooth out the ragged boundaries of districts. *Id.*

[7] The trial court viewed these advances in technological ability negatively. It stated:

This quest for zero deviation, coupled with incumbency protection, led to the creation of districts throughout the state that have highly irregular and often extremely convoluted boundaries. The trial court noted that districts in virtually every urban area had such irregular boundaries and convoluted shapes. *Vera*, 861 F.Supp. at 1317-18, 1326-28.[8] Of course, the districts that are located *entirely* in these urban areas are the most irregular in shape.

For example, in the Fort Worth area Democrat Pete Geren's CD 12 and Republican Joe Barton's CD 6 intertwine in an intricate dance that separates likely Democratic and Republican voters. *See*, St. Ex. 8(2), Joint App. at 192. Each of these districts is heavily Anglo (73.6% Anglo and 87.6% Anglo, respectively). *See*, Pl. Ex. 34-O, Joint App. at 154-60. In the Houston area, Republican Tom DeLay's CD 22 (69.3% Anglo) threads its way between CD 25, then represented by Democrat Mike Andrews (53.0% Anglo) and CD 9, then represented by Democrat Jack Brooks (66.9% Anglo). *Id.* *See, also,* St. Ex. 8(3), Joint App. at 193.

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> . . . never before have districts been drawn on a block-by-block or neighborhood- or town-splitting level to corral voters perceived as sympathetic to incumbents or to exclude opponents of the incumbents. This form of incumbent protection is much different in degree from the generalized, and legitimate, goal of incumbent and seniority protection previously recognized by the Supreme Court.

*Vera*, 861 F.Supp. at 1334. Nowhere does the trial court explain why the use of the computer makes the state's interest in incumbency protection different. The principle remains the same; only the tools used to effect the principle have changed. The trial court erred in disparaging the state's interest in incumbency protection, merely because computers more effectively permit the state to protect its incumbents.

[8] Incumbency protection caused similar irregularities in the urban portions of Texas House of Representatives and Texas Senate districts created by the same Legislature. *See*, St. Ex. 15, Testimony of Paul Colbert, Joint App. at 246-49.

The evidence, acknowledged by the trial court and not disputed by the Plaintiffs, establishes incumbency protection as a traditional districting practice in Texas and shows that the current congressional plan continued this tradition. It should not be surprising, therefore, that the ultimate shapes of CDs 18, 29, and 30 were also affected by this Texas tradition.

In Houston, as of the 1990 census, CD 18 was underpopulated. One proposal required it to take in additional population to the south and thereby mirror an African-American majority Texas Senate district that was very compact. However, this proposal was rejected because it would have destroyed the Democratic character of CD 25 and endangered the reelection prospects for incumbent Mike Andrews. *Vera*, 861 F.Supp. at 1325, U.S. Ex. 1071 at 47-48. CD 18, therefore, had to take in its additional population by going north. Going directly north cut straight through the proposed Hispanic CD 29. The resolution of these competing interests required one of the two minority opportunity districts to wrap around the other. For political reasons, the Legislature decided to wrap CD 18 around CD 29 to encompass the African-American populations located just south and north of downtown.[9]

The ultimate shape of CD 29 was the result of the complex political dogfight between two aspirants for the seat, State Rep. Roman Martinez and State Sen. Gene Green. Martinez' original proposal for CD 29 was a regular and compact east-west district that largely followed the lines of his House of Representatives district. Pl. Ex. 9. Significantly, it

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[9] The plan for the Texas Senate made the opposite choice. In that plan, the Hispanic majority senatorial district wraps around the more compact African-American majority district. *See*, St. Ex. 15, Joint App. at 249. State Rep. Roman Martinez, an aspirant for this congressional seat and a member of the House Redistricting Committee, was unwilling to use the state senate "wrap" for the congressional plan because it included more territory that was favorable to State Sen. Gene Green, also an aspirant for the seat. *Id.*

did not include Green's residence and included very little of his Senate district. U.S. Ex. 1071 at 48. During the legislative process, the proposed district was pushed and pulled between the competing aspirants, each seeking to draw a district that would be more favorable to his candidacy and less favorable to his opponent's. *See, also, Vera,* 861 F.Supp. at 1324-25; Tr. Vol. IV at 31-38, 42-44. The ultimate resolution was a compromise between Martinez and Green that included both men's residences and included large portions of both men's legislative districts. *Id.* at 49. Thus, this tug-of-war between political aspirants was the major force in the ultimate shape of CD 29.

The final configuration of CD 30 in Dallas resulted from similar political forces. State Sen. Eddie Bernice Johnson was the chair of the Senate Subcommittee on Congressional Districts. She announced early in the redistricting process that she would be a candidate for this new seat, and she drew a highly compact district from which she could easily be elected. *Vera,* 861 F.Supp. at 1321. However, the configuration of the proposed district was unacceptable to two incumbent Democratic Congressmen, Martin Frost and John Bryant, because it siphoned off too many of their Democratic voters and endangered their own reelection chances. *Id.* The horse-trading between these incumbents and Sen. Johnson then began. As Johnson's proposed district shed Democrats in the south to Frost and Bryant it began to send tendrils to the north and west to find other Democrats to replace them. The evidence shows that these tendrils contain much *lower* percentages of minority residents than does the core of the district.[10] *See,* St. Ex. 33, Joint App. at 335. These

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[10] Indeed, the most vicious fight between Johnson and Frost was over Anglo Democratic voters in Grand Prairie to the west of Dallas. *See,* St. Ex. 33 at 5th segment, Joint App. at 335. Both Johnson's senate district and Frost's congressional district had included these voters and both wanted to include them in their new districts. Ultimately, they were split between the two. Joint App. at 388.

tendrils have the effect of *lowering* the overall African-American concentration in the district. In effect, they make the district more, rather than less, multi-ethnic.[11]

The ultimate resolution of the battle to preserve all incumbents in the Dallas-Fort Worth area was a complicated three-way swap among Democrat Frost's CD 24, Republican Joe Barton's CD 6, and Democrat Pete Geren's CD 12 that resulted in Frost's and Geren's districts becoming more Democratic and Barton's district becoming more Republican.[12] U.S. Ex. 1071 at 39-40.

In short, the record establishes that the configurations of CDs 18, 29, and 30 were predominantly the result of incumbency protection. Thus, the Legislature did not rely on race "in substantial disregard of customary and traditional districting practices." *Miller v. Johnson, supra,* ___ U.S. at ___, 115 S.Ct. at 2497 (O'Connor, J. concurring)("To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices.")

On these undisputed facts, it was clear error for the trial court to conclude that race, incumbency protection, predominated in the drawing of CDs 18, 29, and 30.[13]

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[11] CD 30 is thus not an example of racial "Balkanization" as described by this Court in *Shaw v. Reno* and *Miller v. Johnson.* It is, rather, a multi-ethnic district (50.9% African American, 17.1% Hispanic, 31.4% Anglo, and 2.4% other) within a single metropolitan area. *See,* Pl. Ex. 34-O, Joint App. at 160

[12] Of course, each also became far more convoluted as well. *See,* St. Ex. 8(2), Joint App. at 192. The trial court did not find that this kind of political horse-trading violated the Equal Protection Clause.

[13] The trial court makes much of the testimony given by Congresswoman Eddie Bernice Johnson in *Terrazas v. Slagle, supra. See, Vera,* 861 F.Supp. at 1319-23. It appears to suggest that her testimony in this case concerning non-racial reasons for many of CD 30's irregular lines ought not to be credited. However, the court acknowledges the other testimony in this case that corroborates Congresswoman Johnson's testimony, *id.,* at 1321-23. Moreover, as

### 2. The Trial Court Erroneously Refused to Recognize Incumbency Protection as a Customary and Traditional Districting Principle Used by the Texas Legislature

The trial court refused to recognize Texas' tradition of incumbency protection as a permissible districting principle because *Shaw* did not expressly refer to it as a "traditional districting principle."[14] This rigid reading of *Shaw* impelled the trial court's erroneous invocation of strict scrutiny.[15] The trial court's rigid interpretation of the term "traditional districting principle" does not comport with the more flexible use of that term in *Miller* in which this Court said that to prove a racial gerrymander:

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noted above, the legislative debates, which predated *Terrazas*, also corroborate her testimony. Finally, it should be noted that in addition to the partisan gerrymander claim discussed above, *Terrazas* was an unsuccessful constitutional and § 2 challenge in which the plaintiffs alleged that Texas had improperly diluted the votes of minorities. In that context, the consideration given by the state to race was the primary focus of both the plaintiffs' case and the state's defense. Other, non-racial, considerations that influenced the shapes of the districts are secondary in such a case. It, therefore, should not be surprising that her testimony in that case had a different emphasis than her testimony in this case.

[14] Specifically, *Shaw* stated:

> So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding *traditional districting principles such as compactness, contiguity, and respect for political subdivisions.*

*Shaw v. Reno*, 509 U.S. ___, ___, 113 S.Ct. 2816, 2827 (1993)(emphasis added).

[15] The trial court noted that "*Shaw* nowhere refers to incumbent protection as a traditional districting criterion." *Vera*, 861 F.Supp. at 1334.

> . . . a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, *including but not limited to* compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

___ U.S. at ___, 115 S.Ct. at 2488 (emphasis added).[16] *Miller* makes clear that the list of traditional districting principles referenced in *Shaw* was a non-exclusive list. This more flexible use of the term "traditional districting principles" respects the policy choices made by the states in their redistricting decision-making and, therefore, comports with the well-established principle that "reapportionment is primarily the duty and responsibility of the State." *Miller v. Johnson*, ___ U.S. at ___, 115 S.Ct. at 2488 (and cases cited therein).[17] Thus, the trial court incorrectly applied strict scrutiny to the facts of this case.

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[16] The *Miller* trial court opinion, which this Court affirmed, also understood "traditional districting principles" to be a flexible term:

> This analysis is made a bit easier by the existence of defined and recognized "traditional districting principles" that influence nearly all redistricting efforts. The *nonexclusive list* includes contiguity, compactness, protecting the integrity of political subdivisions, cognizance of "communities of interest," negotiating geographic barriers, and *protecting incumbents*.

*Johnson v. Miller*, 864 F.Supp. 1134, 1369 (S.D. Ga. 1994)(emphasis added).

[17] The trial court's rigid treatment of *Shaw's* non-exclusive list also ignores this Court's explicit treatment of incumbent protection as a permissible redistricting objective. *See, White v. Weiser, supra; Burns v. Richardson, supra. See, also, Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 2663 (1983)("Any number of consistently applied legislative policies might justify some [population variation among districts], including, for instance, making districts compact, respecting

The court's opinion acknowledges that incumbency protection played an important role in the drawing of Texas' congressional districts. *See, Vera,* 861 F.Supp. at 1317-18. In fact, the court correctly concluded that the districts attacked by the Plaintiffs, other than CDs 18, 29, and 30, were not racial gerrymanders although "there is an extremely high correlation between the irregular features of many of these districts and the racial populations they are drawn to include or exclude." *Id.*, 861 F.Supp. at 1345. The court correctly determined that "both race and politics influenced the divisions of these towns between Congressional districts," *id.*, and correctly held that "[i]t does not follow, however, that racial gerrymandering occurred." *Id.*

The court applied a wholly different standard to CDs 18, 29, and 30 because many of the Democratic voters in and around those districts are also minority members.[18] With respect to CD 30 in Dallas, the trial court noted that

> . . . the infighting among Congressman Frost, Bryant, and then-Senator Johnson for "sympathetic" voters was fierce. As it happens, however, many of the voters being fought over were African-American. The State cannot have it both ways. It cannot say that African-American voters are African-American when they are moved into District 30, but they are merely "Democrats"

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municipal boundaries, preserving the cores of prior districts, *and avoiding contests between incumbent Representatives.* As long as the criteria are nondiscriminatory . . . these are all legitimate objectives that on a proper showing could justify minor population deviations."(emphasis added)

[18] The high percentage of African-American and Hispanic voters who vote Democratic in Harris and Dallas Counties is graphically demonstrated by comparing Pl. Ex. 34-H2, Joint App. at 150, to St. Ex. 9A, Joint App. at 195, and by comparing Pl. Ex. 34-H8 and 34-H9 , Joint App. at 151-52, to St. Ex. 9A, Joint App. at 194.

> when they are deliberately placed in a contiguous district for the purpose of bolstering the re-election chances of other Democrats.

*Id.*, 861 F.Supp. at 1338-39. With respect to CDs 18 and 29 in Houston the court stated:

> Incumbent Democrats were fencing minorities into their districts or into the new majority-minority districts, while those same minorities were effectively being removed from Republican incumbents' districts.

*Id.*, 861 F.Supp. at 1341.

Although this process of sorting likely Democratic and Republican voters in order to protect incumbents is exactly the same as that which occurred throughout the state, the trial court would not permit it in CDs 18, 29, and 30 because the voters sorted are also minority members. Thus, the court has applied a wholly different standard to these districts.

In essence, the trial court's ruling prohibits Texas from using its customary and traditional districting practice of incumbent protection when drawing a minority opportunity district if the resulting district looks strange. This anomalous result, if allowed to stand, would require the state to treat three minority opportunity districts located in its urban areas differently from its other twenty-seven congressional districts because those minority opportunity districts would have to be drawn without any consideration given to the traditional objective of incumbent protection. This result contravenes *Miller*.

### 3. The Constituencies in CDs 18, 29, and 30 Are Not Widely Separated by Geographical and Political Boundaries

The three districts involved here do not suffer the ill of a racially gerrymandered district as defined in *Shaw v. Reno, supra.*

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise *widely* separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.

509 U.S. at ___, 113 S.Ct. at 2827 (emphasis added).

Although *Shaw* does not quantitatively define what it means by "widely separated by geographical and political boundaries," the facts in *Shaw* serve to illustrate the Court's concerns. In *Shaw*, the North Carolina General Assembly drew District 12 to be an African-American opportunity district. As drawn, District 12 was 160 miles long and in some parts no wider than I-85. It contained within its borders various communities of interest - tobacco country, financial centers, and manufacturing areas. It was comprised of ten counties, and it remained contiguous "only because it intersects at a single point with two other districts before crossing over them." *Id.*, 509 U.S. at ___, 113 S.Ct. at 2820-21.[19]

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[19] Texas expresses no opinion about the appropriateness of this North Carolina district. The trial court has held that the district is narrowly tailored to further a compelling state interest, *Shaw v. Hunt*, 861 F.Supp. 408 (E.D. N.C. 1994). That court is in a far better position to make such a judgment than is Texas.

Last term, *Miller v. Johnson* further defined the meaning of the phrase "widely separated by geographical and political boundaries." In *Miller*, the Georgia Eleventh District, which this Court invalidated as a racial gerrymander, included "the black neighborhoods of metropolitan Atlanta and the poor black populace of Chatham County, though 260 miles apart in distance and worlds apart in culture." *Miller*, ___ U.S. ___, 115 S.Ct. at 2484. Eighty percent of District Eleven's African-American population resided in the outlying appendages of the district. This Court concluded that the "social, political and economic makeup of the Eleventh District tells a tale of disparity, not community." *Id.*

Unlike District 12 in *Shaw* and the Eleventh District in *Miller*, CDs 18, 29, and 30 are not "widely separated by geographical and political boundaries," as that phrase has been defined by those cases. Quite the contrary is true. CDs 18 and 29 lie totally within Harris County. The vast majority of CD 30, 98.4% of it, lies within Dallas County. The remaining 1.6% lies in Collin and Tarrant Counties, which are adjacent to Dallas County and all of which are within the Dallas-Fort Worth Metroplex region. St. Ex. 18, Joint App. at 266-303. The longest axis for CD 18 is only 39 miles; for CD 29, it is 43 miles; and, for CD 30, it is 42 miles. All parts of these districts can be traversed in less than an hour. *Id.* Each of the three districts lies within a single media market, newspaper market, and job market. All residents of each of the districts are urban dwellers, sharing concerns unique to urban dwellers, like crime, drugs, and mass transit, to name a few. *Id.* Moreover, unlike District 12 in Shaw and the Eleventh District in *Miller*, the majority of the minority population of each district resides in the core of each district rather than in the extremities of each district. *See, e.g.* Joint App. at 335, 341, and 342.

In short, the concerns raised by this Court in *Shaw* and *Miller* simply do not exist in this case: individuals of the

same race are not widely separated by geographical and political boundaries.

**4. CDs 18, 29, and 30 Are Not the Result of Racial Segregation**

*Shaw v. Reno* recognized that

> In some *exceptional* cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to "segregat[e] . . . voters" on the basis of race. *Gomillion [v. Lightfoot],* 364 U.S. [339,] 341, 81 S.Ct.[125,] 127. *Gomillion*, in which a tortured municipal boundary line was drawn to exclude black voters, was such a case. So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions.

509 U.S. at ___, 113 S.Ct. at 2826-27 (emphasis added). This case is not the "exceptional" case to which *Shaw* addresses itself. In *Gomillion,* Alabama redefined the boundaries of Tuskegee, Alabama so that the city limits went from being shaped like a square to a strangely irregular twenty-eight sided figure. In the process of reconfiguring the city limits, the Alabama Legislature excluded 98.75% of the four hundred African-American voters from the city of Tuskegee. Segregation aptly describes the actions taken by Alabama in *Gomillion.*

Segregation does not describe the actions taken by the Texas Legislature here.[20] The minority populations in Dallas and Harris County are not dispersed. Rather, they are concentrated in certain portions of each county. *See* Pl. Ex. 34H2, 34H8, 34H9, Joint App. at 150-152. The Legislature drew CDs 18, 29, and 30 to reflect the concentrated locations of these minority populations. They are not an example of the State concentrating dispersed populations.

Moreover, CDs 18, 29, and 30 are the congressional districts in the State that are least dominated by any one racial or ethnic group. CD 18 has a voting age population that is 48.6% African-American, 13.7% Hispanic, and 35.2% Anglo; CD 29 has a voting age population that is 55.4% Hispanic, 9.8% African-American, and 33.4% Anglo; and, CD 30 has a voting age population that is 47.1% African-American, 15.1% Hispanic, and 36.1% Anglo. *See,* Joint App. at 154-60. In fact, the state's expert, Dr. Chandler Davidson, noted that CD 30 has the smallest African-American population of any of the seventeen African-American opportunity districts in the South. St. Ex. 17 at 55.

By comparison, CD 6 has a voting age population that is 88.8% Anglo, 4.0% African-American, and 4.9% Hispanic. *See,* Joint App. at 157. CD 6 is not unique. A total of nine districts, CDs 1, 3, 4, 6, 8, 17, 19, 21, and 26, have an Anglo voting age population greater than 80%. *Id.* at 154-60. The trial court ruled that none of these districts was racially gerrymandered.

To conclude that the Legislature "segregated" CDs 18, 29, and 30 trivializes and dilutes a term which historically has been used to describe legislative acts that

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[20] The trial court wrongly concluded that the Texas Legislature segregated the tri-ethnic population of Texas: "Not only did the state know the precise location of African-American, Hispanic, and Anglo populations, but it repeatedly *segregated* those populations by race to further the prospects of incumbent officeholders or to create 'majority-minority' Congressional districts." *Vera*, 861 F.Supp. at 1309 (emphasis added).

resulted in one race dominated districts. The evidence establishes that the Texas Legislature did not segregate CDs 18, 29, and 30.

### B. This Court Should Reverse the Judgment of the Court Below and Render Judgment in Favor of the State

The trial court erroneously invoked strict scrutiny. The record clearly establishes that the state used the "customary and traditional districting practices" in drawing CDs 18, 29, and 30 that it has historically used and that it used in drawing all of Texas' thirty congressional districts. Therefore, the state defeated a claim that a district has been gerrymandered on racial lines. This Court should reverse the ruling of the trial court and render judgment for the appellants.

## II.
## ALTERNATIVELY, IF PLAINTIFFS HAVE SHOWN THAT RACE WAS THE PREDOMINANT FACTOR, CDS 18, 29, AND 30 WERE NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST

### A. Texas Had a Compelling State Interest in Drawing CDs 18, 29, and 30

In *Shaw v. Reno, supra*, this Court suggested, without deciding, that compliance with the Voting Rights Act, 42 U.S.C. § 1971, et seq., and the eradication of the effects of past racial discrimination could be state interests that are sufficiently compelling to justify race-conscious redistricting. 509 U.S. at ___, 113 S.Ct. at 2830-31. Last term, in *Miller v. Johnson, supra*, this Court again assumed that such a state interest could be compelling. The issue was not decided in *Miller* because the Court held that even if the interest was compelling in Georgia, the means was not narrowly tailored to

further that interest. *Id.*,___ U.S. at ___, 115 S.Ct. at 2490-91. On remand, the trial court in *Shaw* expressly held that compliance with both the Voting Rights Act and a desire to ameliorate the effects of past discrimination are compelling state interests that can justify race-based redistricting. *Shaw v. Hunt*, 861 F.Supp. 408, 437 (E.D. N.C. 1994).

Like the North Carolina case, this case squarely presents the issue to this Court. Texas intentionally maintained CD 18 as an African-American opportunity district and intentionally created CDs 29 and 30 as minority opportunity districts in order to comply voluntarily with its reasonable belief, based upon strong evidence, that it was required to do so by the Voting Rights Act, and because it desired to insure that minorities who have historically been excluded from the electoral process in Texas had a reasonable opportunity to elect candidates of their choice. Both of these motives are compelling state interests.

To hold otherwise will subject political jurisdictions, like Texas and its thousands of political subdivisions that are covered by the Voting Rights Act, to endless litigation every time they comply, willingly or unwillingly, with the § 5 and § 2 requirements of the Act. Compliance with the Act cannot occur without race consciousness. Unless this Court is willing to hold the Voting Rights Act unconstitutional, a state's interest in compliance must be treated as compelling.

**1. Texas Had a Strong Basis in Evidence to Believe that § 5 of the Voting Rights Act Required the Maintenance of CD 18 as an African-American Opportunity District**

The Texas Legislature created CD 18 as a minority opportunity district in 1971. It was the only African-American opportunity district of the 24 districts contained in that redistricting plan.[21]

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[21] CD 18 maintains a distinguished place in the history of African-American politics in Texas. In the 1970's round of redistricting, the

In 1975, Texas became a covered jurisdiction under the Voting Rights Act. Section 5 of the Act requires Texas to obtain administrative preclearance from the United States Attorney General or approval from the United States District Court for the District of Columbia of any change involving a "standard, practice, or procedure with respect to voting" made after November 1, 1964. 42 U.S.C. § 1973c. This preclearance requirement applies to congressional districting plans. *Beer v. United States*, 425 U.S. 130, 133, 96 S.Ct. 1357, 1360 (1976).

The relevant standard for preclearance under § 5 is a determination that the proposed change does not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, *supra*, 425 U.S. at 141, 96 S.Ct. at 1364.

Texas almost certainly would have drawn an objection under § 5 if it had created no African-American opportunity districts in 1991. A drop from one district in twenty-seven (3.7%) to zero districts in thirty (0%) would have been a retrogression, particularly when the African-American population in Texas had remained a relatively constant proportion of the state's population (11.89% in 1980 and

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Legislature intentionally drew the district so that then-State Senator Barbara Jordan could win it. U.S. Ex. 1071 at 10. Ms. Jordan was the first African-American member of the Texas Senate since 1883. She served in the Texas Senate with distinction for several years, and was able to persuade the Legislature to create a minority opportunity congressional district in Houston. After its creation, Ms. Jordan was easily elected as the first African-American member of Congress from Texas since Reconstruction. *Id.* at 10-11. She remained in Congress until her retirement for health reasons in 1978. *Id.* at 23. In 1979, Ms. Jordan was succeeded by Mickey Leland, who represented CD 18 until his untimely death in a plane crash. He, in turn, was succeeded by Craig Washington, and, recently by present Congresswoman Sheila Jackson Lee.

11.63% in 1990). *Vera*, 861 F.Supp. at 1311. Of course, the state did not run this risk because the Texas Legislature understood its obligation to maintain CD 18 as one in which African Americans could elect their candidate of choice. *See*, St. Ex. 15, Joint App. at 251-52.

In *Shaw*, this Court cautioned that a "reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw v. Reno, supra*, 509 U.S. at ___, 113 S.Ct. at 2831. The evidence in this case conclusively shows that Texas did not run afoul of this caution when it redrew CD 18 in 1991.

Upon completion of the 1980's redistricting, CD 18 had an African-American population in the low 40% range and an Hispanic population in the low 30% range. Joint App. at 260. As the 1990 census approached, population projections indicated that much of the African-American population in Houston had migrated out of the center city core of CD 18 into more suburban areas. Thus, by 1990, Houston's African-American population was located in a "Y" radiating out from downtown,[22] and CD 18 no longer had a plurality that was African-American. CD 18's racial makeup before the 1991 redistricting was 35.1% African-American, and 42.2% Hispanic. *Vera*, 861 F.Supp. at 1323. According to the 1990 census, 527,964 African-American persons lived in Harris County. *Vera*, 861 F.Supp. at 1312. In order to maintain CD 18 as an African-American opportunity district, the district's boundaries had to shift.

The coalition between Hispanics and African Americans that existed in the district in the 1970's and early 1980's had begun to break down by the late 1980's. *Vera*, 861 F.Supp. at 1316. Therefore, maintaining CD 18 at its 1990

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[22] Plaintiffs' witness, Dr. Ronald E. Weber, described the locations of African-American concentrations as being at 10:00 o'clock, 1:00 o'clock, and 6:00-7:00 o'clock. Tr. Vol. II at 63-64. *See, also*, Pl. Ex. 34-H8, Joint App. at 151.

ethnic percentages would not continue CD 18 as an African-American opportunity district. Consequently, the Legislature chose to redraw CD 18 with a bare African-American majority of 50.9%.

**2. Texas Had a Strong Basis in Evidence to Believe that § 2 of the Voting Rights Act Required the Creation of Minority Opportunity Districts in Dallas and Houston and the Maintenance of CD 18 in Houston**

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, required the creation of an Hispanic opportunity district in Houston and the continuation of a Houston African-American opportunity district.[23] The presence of Harris County's large Hispanic and African-American populations alone, of course, does not create an obligation to create opportunity districts for these populations. Rather, § 2 requires the creation of such a district when three preconditions are present: (1) the minority population is sufficiently numerous and sufficiently compact that it can form the majority of a district, (2) the minority population is politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority community's candidate of choice, *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766 (1986); *Growe v. Emison*, 507 U.S. ___, ___, 113 S.Ct. 1075, 1084 (1993), and under the totality of the circumstances a failure to create such a district would result in the dilution of the minority community's vote.

Both the Hispanic and African-American communities in Houston easily satisfied the first prong of the *Gingles* test. Each was numerous enough to form a majority in a compact congressional district. *See*, St. Ex. 12A and 12B, Joint App. at 197-200. In fact, highly compact districts were proposed for

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[23] This § 2 obligation is separate from and analytically distinct from any obligation under § 5.

each population during the legislative process. Each of the proposals was rejected for political reasons, and the districts actually adopted by the Legislature were more irregular and less compact. However, *Gingles* does not require a § 2 plaintiff to meet some "aesthetic ideal of compactness." *Clark v. Calhoun County, Mississippi*, 21 F.3d 92, 95 (5th Cir. 1994). *Gingles* only requires such a plaintiff to show that a compact district *could be drawn*. *Id.* *See, also, Houston v. Lafayette County, Mississippi*, 56 F.3d 606, 611 (5th Cir. 1995). Once a § 2 plaintiff establishes the existence of a § 2 violation, the governmental entity must be given the first opportunity to develop a remedial plan. *Id.* A remedial district that is oddly shaped or that has ragged edges does not show a failure to meet the first *Gingles* precondition. *Id.*

Thus, the demonstration to the Legislature that compact districts in which both the African-American and Hispanic populations in Houston could constitute a majority was sufficient evidence upon which the Legislature could, and should, act. The remedial districts actually adopted by the Legislature have no relevance to the question of whether potential § 2 plaintiffs in Houston would be able to meet the first *Gingles* precondition.

The evidence available to the Legislature indicated that the second and third *Gingles* preconditions could also be shown by these two minority communities in Houston. Each community was politically cohesive, and the evidence continued to show the presence of racially polarized voting in the Houston area such that the white majority continued to vote sufficiently as a bloc that it could usually defeat the minority candidate of choice. *Vera*, 861 F.Supp. at 1316. *See, also,* St. Ex. 15, Joint App. at 251-53.

Thus, the Legislature had a strong basis in evidence to believe that under the *Gingles* test, it was obligated to create an Hispanic minority opportunity district in Houston and obligated to maintain an African-American opportunity district. How it would carry out that obligation was the political question appropriately left to the Legislature.

During the 1960's, the Hispanic and African-American populations in Houston had built coalitions between themselves to have an impact on the local political scene. Beginning in the mid 1980's this coalition began to break down. Several city council election contests saw these two communities backing different candidates and allying themselves with Anglo voters to defeat the candidate of choice of the other minority community. This trend culminated in a bitterly contested mayoral race in which Hispanic voters successfully allied with Anglo voters to elect Anglo Bob Lanier over African-American State Rep. Sylvester Turner. *Vera*, 861 F.Supp. at 1316. *See, also,* Joint App. at 251. Thus, two highly compact districts, each of which contained approximately equal numbers of Hispanic and African-American residents, were out of the question. *Id.*

Because of this fracturing of the former coalition between the two minority communities, the creation of an Hispanic opportunity district while simultaneously maintaining CD 18 as an opportunity district for African Americans became a more difficult task. But for the political tensions between two strong aspirants for this seat and the lack of coalitions between Hispanic and African-American voters, two relatively compact and regularly shaped districts could have been drawn to give the combined Hispanic and African-American communities in Houston the opportunity to elect candidates of their choice. The interlocking location of the two populations and the breakdown of the coalition meant that one district had to wrap around the other in order to draw an Hispanic opportunity district and simultaneously maintain the African-American opportunity district. The Legislature appropriately chose to accommodate all of these competing interests.

In Dallas, during the 1980's round of redistricting, promises had been made to the African-American community in Dallas that it would receive an opportunity district. Those promises were not fulfilled. U.S. Ex. 1071 at 15-22. Instead, the African-American population of Dallas County was split

between CDs 5 and 24. By 1990 the census figures showed that the African-American population of Dallas County was 362,130, clearly more than enough to constitute a majority of a congressional district. *Vera*, 861 F.Supp. at 1312. A compact district containing this population could easily be drawn and was actually proposed.[24] *See* Pl. Ex. 29A, Joint App. at 139. *See, also,* St. Ex. 12C, Joint App. at 201. In addition, the other two *Gingles* preconditions were present. This population was politically cohesive, and racially polarized voting continued to exist in the Dallas area. In fact, just as the redistricting process began, the trial court's decision in *Williams v. City of Dallas*, 734 F.Supp. 1317, 1393 (N.D. Tex. 1990) concluded that "it is clear that there is white bloc voting in Dallas which usually defeats the preferred choice of African-Americans." In light of this contemporaneous finding by that court, testimony presented to the Legislature in public hearings, *see,* U.S. Ex. 1086(l), and other information of which the Legislature was aware, little debate about the necessity for the creation of such an opportunity district in the Dallas area occurred.[25] The debate over CD 30 concerned how to comply with the state's § 2 obligation while simultaneously protecting the affected incumbents. Through a series of political compromises, the Legislature found a way to do both.

The Plaintiffs' witnesses did not dispute the conclusions of the Legislature concerning the need to maintain CD 18 and simultaneously create additional minority opportunity districts in Dallas and Houston. Rep. Grusendorf testified at trial:

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[24] Of course, the ultimate shape of the district is not this compact shape. The dynamics that lead to the district's final shape are discussed in some detail, *supra.*

[25] The trial court noted that the agreement to create an African-American opportunity district in Dallas traversed party lines. *Vera*, 861 F.Supp. at 1315, n. 12.

Q. I believe you testified also that you had no problem with the creation of a Black district in the Dallas County area; is that correct?
A. In fact, I think I told you I really thought in 1982 we should have drawn a Black district in Dallas County.
Q. It was long overdue?
A. That's correct. That was not the problem. The problem in congressional redistricting was not on the Black district, but it was, like I said earlier, the feeding frenzy of white Democrats not want go to [sic] give up those Blacks.

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Q. You also, I think, testified in your deposition--and tell me if you have changed your views on this--that you also thought it was appropriate to create an additional Hispanic district. You had no problems creating an additional Hispanic district in Harris County?
A. That's correct.
Q. And in South Texas?
A. That's correct.

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Q. Was it your view that the Voting Rights Acts [sic] required such an approach?
A. Yes. My view was that the Voting Rights Act required that when possible we draw minority districts.
Q. You found it possible in all three of those area?
A. Yes.

> Q. Including, in general, the areas--I am not saying the precise districts, but in general the areas now encompassed by District 30, District 28 and District 29? I am not saying the shape of the districts as they are, but in general, the areas?
> A. In general.
> Q. So, it's your view there is sufficiently compact aggregation of minority voters of Hispanics in the two Hispanic districts, Blacks in the district in Dallas, to draw those kind of districts so that minority voters have an opportunity to elect the candidate of their choice?
> A. I think you can draw minority districts that are much more compact where minorities can elect their own representative, yes.
> Q. And the need to do this derives, as you have indicated, in part from the Voting Rights Act?
> A. I think I told you Friday that I thought that the Voting Rights Act required it, and I also think fairness would require it.

Tr. Vol. I at 99-101. [26] Thus, all parties agree that those districts were required. The dispute is over their shapes.

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[26] The third new minority opportunity district created by the Legislature was in the San Antonio and South Texas area. This district was intentionally created to give Hispanic voters further opportunities to elect the candidates of their choice. Again, there was virtually no debate in the Legislature about the goal of creating this district. Unlike the new districts allocated to Houston and Dallas, the lines for the new San Antonio-South Texas district were settled without difficulty. U.S. Ex. 1071 at 50-51. Although the Plaintiffs also challenged CD 28, the trial court rejected the challenge. The trial court found that the district was "a designedly Hispanic district," found that then-Senator Frank Tejeda "influenced the drawing of district lines so that as much of his Bexar County constituency as possible would fall within the district," and found that the district had

In light of the evidence in the record, the trial court's statement that, "It is not obvious to this court that the State *justifiably* feared potential liability under § 2 or § 5 of the Voting Rights Act if it failed to protect District 18 and set aside three new districts--Districts 28, 29 and 30--for minority Congressmen," *Vera*, 861 F.Supp. at 1343-44 (emphasis in original)(footnote omitted), is mystifying. In a footnote (n. 54 at 1343-44), the trial court attempted to explain this enigmatic statement. The court's reasoning has two important flaws.

First, it assumes that a potential § 2 plaintiff in Houston or Dallas would have to show a court that the districts actually adopted by the Legislature were "compact" within the meaning of *Gingles*. As discussed above, the Fifth Circuit Court of Appeals has squarely held that this assumption is incorrect. *Houston v. Lafayette County, Mississippi, supra; Clark v. Calhoun County, Mississippi, supra.* Rather, *Gingles* only requires that a minority population be sufficiently compact that a district *could be drawn*. As the trial court properly noted, the evidence in this case shows clearly that highly compact minority opportunity districts could be drawn in both Dallas and Houston. *Vera*, 861 F.Supp. at 1343. That the Legislature chose to draw less compact districts does not change the nature of the proof that would be required of potential § 2 plaintiffs.

Second, the trial court notes that a court hearing a § 2 case cannot presume the existence of racially polarized and bloc voting. Rather, a plaintiff in such a case must prove that such voting exists. In light of the evidence known to the Legislature, discussed above, and confirmed at trial by the state's witness, Alan Lichtman, Tr. Vol. IV at 186-90, and others, it is clear that a § 2 plaintiff likely would have been able to meet this *Gingles* requirement as well.

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fingers that jutted into the small cities of Seguin and New Braunfels in order to "excise[] the minority, largely Hispanic populations from those cities," but held that this district was not a racial gerrymander. *Vera*, 861 F.Supp. at 1344.

Thus, far from being merely a "ritualistic invocation of § 2," *Vera*, 861 F.Supp. at 1343, n. 54, the state had good reason, based on substantial evidence in this record, to believe that the Voting Rights Act required the creation of minority opportunity districts in Dallas and Houston. The Legislature then appropriately fit these districts into the same political process that it applied to all other districts in the state.

### 3. The State Need Not Wait to be Sued

In *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803 (1966), this Court upheld the constitutionality of the preclearance requirement of § 5 of the Voting Rights Act. The court characterized § 5 as a necessary and constitutional response to some states' "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.*, 383 U.S. at 335, 86 S.Ct. at 822 (footnote omitted). Section 2 of the Act has a related purpose of insuring that minority voters are not prevented from effectively participating in the electoral process. *See, Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986).

The *Shaw* court on remand noted that this Court

> . . . has recognized consistently that the Voting Rights Act is the single most important piece of federal anti-discrimination legislation ever passed by Congress--enacted, and then twice extended, with the avowed purpose of putting a stop to nearly a century of "'unremitting and ingenious defiance' of the commands of the Fifteenth Amendment" by the states and "'banish[ing] the blight of racial discrimination in voting' once and for all." *McCain v. Lybrand*, 465 U.S. 236, 244, 104 S.Ct. 1037, 1043, 79 L.Ed.2d 271 (1984) (*quoting South*

*Carolina v. Katzenbach*, 383 U.S. 301, 308-09, 86 S.Ct. 803, 808-09, 15 L.Ed.2d 769 (1966).

*Shaw v. Hunt, supra*, 861 F.Supp. at 438.

In light of the importance of this legislation, voluntary compliance by the states must be encouraged. Indeed, Justice O'Connor has noted that this Court's "recognition of the responsible state actor's competency to take [steps toward voluntary compliance with anti-discrimination laws] is assumed in our recognition of the States' constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 291, 106 S.Ct. 1842, 1856 (1986)(O'Connor, J. concurring)(emphasis in original).

In this case, the trial court noted that "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods are an unfortunate part of this State's minority voting rights history." *Vera*, 861 F.Supp. at 1317. Moreover, the Department of Justice "has frequently interposed objections against the State and its subdivisions." *Id.* In light of this history, Texas should be commended, rather than censured, for its attempt to ameliorate the effects of its past in voluntarily undertaking to insure that its minority citizens have an equal opportunity to participate in the electoral process.

### B. Texas Narrowly Tailored These Districts to Further Its Compelling State Interest

The trial court erred in concluding that a minority opportunity district could not be narrowly tailored unless it was configured in the most compact manner. The trial court held that the state had failed to show that CDs 18, 29, and 30 were narrowly tailored because the evidence showed that more

compact districts could have been drawn in Dallas and Houston. However, the trial court's reasoning has two fundamental and fatal flaws.

First, the court's conclusion is a misreading of *Shaw v. Reno*. In discussing "traditional districting principles such as compactness, contiguity, and respect for political subdivisions," 509 U.S. at ___, 113 S.Ct. at 2827, the Court stated:

> We emphasize that these criteria are important not because they are constitutionally required--they are not, . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.

*Id.* The trial court's conclusion ignores this caution and elevates compact shape from a constitutionally permissible consideration to a constitutional requirement.

Second, the trial court's conclusion that more compact minority districts could have been drawn is true only if one ignores Texas' traditional districting principles. That is, more compact minority opportunity districts could have been drawn only if the state gave predominant (or indeed, even exclusive) consideration to the ethnic make-up of the districts, and ignored the political give and take that applied to every other district in the state.[27]

The proper legal standard for narrow tailoring in the context of minority opportunity voting districts drawn in part to comply voluntarily with the Voting Rights Act was enunciated by the trial court on remand in *Shaw v. Hunt*, 861 F.Supp. 408 (E.D. N.C. 1994). That court held that narrow tailoring in this context means that the state drew no more

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[27] The uncontradicted evidence showed that alternate plans with more compact minority opportunity districts would have paired incumbents and would have changed the partisan alignment of the state's congressional delegation. *See*, Joint App. at 208-21.

minority opportunity districts than were reasonably required by the Voting Rights Act and placed no more minority voters within those districts than was reasonably necessary to give the group a reasonable opportunity to elect candidates of their choice. The purpose of the Act is to insure that all voters are able to participate equally in the electoral process. Requiring minority opportunity districts to be regularly shaped and compact does little to further that purpose, particularly when the undisputed evidence is that Texas places little value upon shape and compactness in its election districts.

The evidence at trial conclusively shows that the three districts invalidated by the trial court were narrowly tailored to further the state's compelling interest in complying with the Voting Rights Act. The state created no more minority opportunity districts than were required by the Act, designed them with no greater concentration of minority voters than was necessary to give those voters a reasonable opportunity to elect candidates of their choice, and otherwise subjected those districts to the same criteria and political process that all other districts in the state underwent.

1. **Districts Were Drawn to Provide a Reasonable Opportunity to Elect Candidates of Choice**

All three of these districts are competitive districts, i.e. they do not guarantee to any ethnic group the ability to elect candidates of choice. Rather, they provide a reasonable opportunity to do so, provided the dominant ethnic group organizes, registers its voters, and turns them out on election day.

CD 18 in Houston and CD 30 in Dallas have bare population majorities that are African-American (50.9% and 50.0%, respectively), and African Americans do not constitute a majority of their voting age populations (48.6% and 47.1%, respectively). Pl. Ex. 34-O, Joint App. at 154-60. So long as polarized voting continues to occur, and in light of the demographics of the district, African-Americans have an

incentive to seek out support from other racial and political groups. Thus, the districts offer opportunity, but do not guarantee electoral success. That, and nothing more, is what the Voting Rights Act requires; that, and nothing more, is what the Legislature provided when it drew these districts.

CD 29 in Houston has a population majority that is Hispanic (60.6%), but its voting age population is 55.4% Hispanic, Pl. Ex. 34-O, Joint App. at 160, and its voter registration rate is just 26.3% Hispanic. U.S. Ex. 1071 at 49. This radical fall-off in registration rates is in part attributable to the presence of non-citizen Hispanics in the district and in part to a lower voter registration rate for Hispanics. In any event, it cannot be said that the Legislature concentrated more Hispanics in CD 29 than was reasonably necessary to give them an opportunity to elect their candidate of choice. Indeed, although they are the largest single ethnic group in the district, Hispanics have been unable to elect their candidate of choice in the last two vigorously contested congressional elections. Rather, in those elections the candidate of choice for Hispanics has been twice narrowly defeated by an Anglo who was not the candidate of choice.[28]

### 2. The State Drew No More Districts Than Were Reasonably Necessary

Unlike Georgia in *Miller v. Johnson*, *supra*, Texas did not set out to maximize minority voting strength. Indeed, the

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[28] The State Defendants do not in any way mean to suggest that an Anglo candidate cannot be the candidate of choice for a minority community. Indeed, CD 16, a majority Hispanic district in El Paso, has been represented for a number of years by its candidate of choice, Ron Coleman, who is Anglo. Tr. Vol. II at 117-18. Rather, the evidence in this case simply shows that in the last two congressional elections in CD 29, the successful Anglo candidate, Gene Green, was not the candidate of choice for Hispanic voters. Tr. Vol. II at 118. Over time, that situation might well change as the voters of the district continue to be represented by Congressman Green.

Legislature rejected several alternative plans that created more minority opportunity districts than the plan ultimately enacted. Instead of trying to maximize the number of such districts, whether one considers the population of the state as a whole or separately considers the populations in the Houston and Dallas areas, it is clear that the Texas Legislature has created no more minority opportunity districts than were required by the Voting Rights Act.

The 1990 census indicates that the state as a whole had a population of 16,986,510. *Vera*, 861 F.Supp. at 1311. Of this total, 11.63% was African-American and 22.55% was Hispanic. *Id.* Of the thirty congressional districts, two (18 and 30) are opportunity districts for African-Americans and seven (15, 16, 20, 23, 27, 28, and 29) are opportunity districts for Hispanics. Thus, approximately 6.7% of Texas' congressional districts were drawn to give African Americans the opportunity to elect their candidates of choice, and 23.3% were drawn to give Hispanics the same opportunity.[29] On a statewide basis, the state's African-American population is underrepresented and the state's Hispanic population is approximately proportionately represented.[30]

If the appropriate focus of inquiry is upon the two metropolitan areas, the picture is the same. Harris County's total 1990 population was 2,818,199, of which 644,935 was Hispanic (22.9%) and 527,964 was African-American (18.7%). *Vera*, 861 F.Supp. at 1312. The total population of Harris County would entitle it to 4.977 congressional districts. 4.977 districts times 22.9% equates to 1.14 districts. 4.977 districts times 18.7% equates to .93 districts. Therefore,

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[29] In fact, two of these districts, CD 16 in El Paso and CD 29 in Houston, have elected Anglos to serve as their Congressmen.

[30] Of course, the presence or absence of proportionality is but one factor to be considered as part of the totality of the circumstances when determining whether members of a minority group have less opportunity than other members of the electorate to participate in the political process. *Johnson v. De Grandy*, ___ U.S. ___, 114 S.Ct. 2647 (1994).

looking only at Harris County, the Hispanic population is slightly underrepresented, and the African-American population is slightly overrepresented.

The current plan simply does not attempt to create more minority opportunity districts than the minority population in the Houston area would justify. In fact, during the legislative process, the Legislature rejected alternative plans that would have created a second African-American opportunity district in the Houston area. *See,* St. Ex. 15, Joint App. at 253 and St. Ex. 25, Joint App. at 304-33. These plans, proposed by State Reps. Ron Wilson and Jerald Larry, linked African-American populations south of Houston with African-American populations in other coastal communities and in East Texas. Each of the proposed districts meandered over hundreds of miles. *Id.* The Legislature rejected both plans out of hand. *Id.* Instead, the Legislature simply maintained the single African-American opportunity district that is entirely in Harris County.

The Dallas area presents a similar picture. The total 1990 population of Dallas County was 1,852,810, of which 362,130 was African-American (19.54%). *Vera,* 861 F.Supp. at 1312. The total population of Dallas County would entitle it to 3.27 congressional districts. 3.27 districts times 19.54% equates to .639 districts.

Here, too, the current plan does not attempt to create more minority opportunity districts than the population might reasonably justify. Here, too, an alternative plan proposing the creation of an additional opportunity district was presented to the Legislature. State Sen. Teel Bivins presented a plan that would have created a combined African-American and Hispanic opportunity district in Tarrant County, thus creating ten minority opportunity districts overall in the state. *See*, U.S. Ex. 1092, Senate Committee of the Whole, 8/24/91 at 3-13. According to its author, the plan was explicitly designed with one objective: "to maximize minority voting strengths." *Id.* at 4. By a vote of 20-10 the Senate rejected the Bivins plan.

Thus, the evidence conclusively shows that Texas did not create, or even seriously consider creating, more minority opportunity districts than were reasonably required under the Voting Rights Act to insure that minority voters had an equal opportunity to participate in the electoral process. Moreover, Texas did not create districts that would guarantee minority electoral success, but rather provided competitive opportunity districts for minority voters.

### 3. The State Gave No More Consideration to Race Than Was Reasonably Necessary to Achieve the Goal

This Court has recently stated that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." *Johnson v. De Grandy*, ___ U.S. ___, ___, 114 S.Ct. 2647, 2661 (1994).

The overwhelming evidence in this case is that the protection of incumbents was the overriding concern of the Legislature. Repeatedly during the legislative debates this point was emphasized and criticized. Like every other affected group, minority groups in Texas worked within this framework. Although the Legislature set the goals of maintaining CD 18 as an opportunity district for African Americans in Houston and creating new opportunity districts for Hispanics in Houston and South Texas and for African Americans in Dallas, the ultimate shapes of these districts were molded by the same highly charged political process that molded the shape of every other district in the state. Thus, rather than being treated as sacrosanct and insular, minority voters in Texas were required to make the same political compromises and accommodations that every other affected group had to make, and the districts intended to give minority voters an opportunity to elect candidates of their choice are the result of this process.

Thus, although race-consciousness played a role in the setting of the goals for these three minority opportunity districts, the actual implementation of those goals was subject to the same districting considerations that drove the creation of every other district in the state. The state, therefore, gave no greater consideration to race than was necessary to achieve the goal of insuring that minority voters in these communities are able to participate equally in the electoral process.

**4. The State Must be Able to Consider Its Usual Race-Neutral Districting Objectives**

This Court has repeatedly acknowledged the political nature of redistricting decisions. In *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 2331-32 (1973), this Court described the redistricting process:

> Politics and political considerations are inseparable from districting and apportionment . . . . [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

In *Gaffney*, the plaintiffs attacked the plan because the shapes of districts were "indecent" and because the redistricting board had attempted to "wiggle and joggle" boundary lines to ferret out pockets of each party's strength. *Id.*, 412 U.S. at 752, n. 18, 93 S.Ct. at 2331. In response, this Court said that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Id.* The Court held that a plan that intentionally drew districts to roughly approximate the relative strength of the major political parties did not violate the Constitution's Equal Protection Clause.

The Court had these further cautionary words concerning court intrusion into the redistricting process: "[W]e have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Id.*, 412 U.S. at 754, 93 S.Ct. at 2332.

In *White v. Weiser, supra*, decided the same day as *Gaffney*, the issue was whether the trial court could properly disregard Texas' explicit policy choice to protect incumbents when choosing a plan to remedy a one-person, one-vote violation. The Court held that the trial court was obligated to honor that choice when it was possible to do so and still remedy the violation. The Court again cautioned the lower federal courts about disregarding a legislature's political choices:

> As we have often noted, reapportionment is a complicated process. Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task. . . . Here those decisions were made by the legislature in pursuit of what were deemed important state interests. Its decisions should not be unnecessarily put aside. . . .

*Id.*, 412 U.S. at 795-96, 93 S.Ct. at 2355.

The trial court's decision in this case puts aside the political choices made by the Legislature as manifested by its redistricting practices and replaces them with the court's own ideal of what redistricting practices the Legislature should pursue (compactness, contiguity, and respect for political subdivisions). It ignores the traditional and customary redistricting practices of the Texas Legislature and forces the state to ignore the political consequences of its redistricting decisions when creating minority opportunity districts in the state's largest urban areas. Indeed, the trial court's decision prohibits the state from considering factors which the state has historically deemed important, and which the evidence shows, have driven the decisions concerning the shapes of the other non-minority districts in the state.

The trial court's decision has other consequences as well. It holds that minority opportunity districts drawn to comply with the Voting Rights Act "must have the least possible amount of irregularity in shape, making allowances for traditional redistricting criteria." *Vera*, 861 F.Supp. at 1343. Of course, as *Gaffney* succinctly holds, neither compactness nor attractiveness are constitutional requirements. Thus, the trial court's decision imposes a wholly different standard upon CDs 18, 29, and 30 than would apply to the state's twenty-seven other congressional districts.[31]

The trial court's decision also has other disturbing implications. Implicitly it says that Anglo officeholders may not fight to keep minority voters in their districts if the consequence of such a fight is to make districts irregularly shaped. It says that minority voters may not attempt to retain officeholders who have been favorable to them if the result is irregularly shaped districts. And it says that a state may not require minority officeholders and residents to "pull, haul and

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[31] The trial court explicitly found that other Anglo majority districts throughout the state were irregularly shaped (in the trial court's words, "disfigured"), *Vera*, 861 F.Supp. at 1309, but held that these districts were not unconstitutional.

trade" in the political arena like other affected citizens. Rather, the trial court's decision in effect says that race must override all of these political considerations, except for the "traditional districting practices" that the court favors, and the only permissible result is a district that has the least possible amount of irregularity in shape. *Shaw v. Reno* and *Miller v. Johnson* do not mandate such a result. This Court should reverse the judgment of the trial court and render a judgment in favor of the State of Texas.

## III.
## THE APPELLEES DO NOT HAVE STANDING

*Shaw v. Reno, supra,* recognized that a racial gerrymander constitutes a racial classification and, therefore, may violate the Equal Protection Clause of the Fourteenth Amendment if not narrowly tailored to further a compelling state interest. Racial classifications generally "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." 509 U.S. at ___, 113 S. Ct. at 2824.

This Court in *United States v. Hays*, ___ U.S. ___, ___, 115 S.Ct. 2431, 2436 (1995), held that "any citizen able to demonstrate that he or she, personally, has been injured by that kind of racial classification [a racial gerrymander] has standing to challenge the classification in federal court." Racial gerrymandering can result in "representational harms." *Id.* Representational harm occurs when officials elected from a racially gerrymandered district that is "created solely to effectuate the perceived common interests of one racial group . . . are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw v. Reno, supra,* 509 U.S. at ___, 113 S. Ct. at 2827.

Thus, to have standing to bring a claim of racial gerrymandering a plaintiff must show that he resides in the

racially gerrymandered district and that he has suffered "representational harm."

*Hays* teaches that if a plaintiff fails to prove that he resides in an allegedly racially gerrymandered district, then he presumptively has no standing because he has not been the subject of a racial classification and, therefore, has not suffered the special representational harms defined in *Shaw*, absent evidence to the contrary.

Moreover, if a plaintiff proves that he resides in an allegedly racially gerrymandered district, then *Hays* requires proof of representational harm in order to establish standing.[32] This result follows for three reasons.

First, without proof of representational harm, all persons residing in an allegedly racially gerrymandered district would have standing. In this case, since there are three districts at issue, each with a population of 566,217 people, a total of 1,698,651 people would have standing to sue. This result renders meaningless the concrete injury requirement of the standing doctrine. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, 112 S.Ct. 2130, 2143 (1992). A plaintiff must, therefore, offer proof of representational harm in order to establish standing, otherwise the injury complained of will not be "concrete and particularized" and "actual and imminent", *Id.*, 504 U.S. at ___, 112 S.Ct. at 2138, but would, in reality, be nothing more than a general grievance about government claiming harm to his interest and the interest of every citizen in the district.

Second, without proof of representational harm, residents of the district who simply disagree with the party affiliation and philosophy of the elected representative would be able to press their legally uncognizable cause of action by dressing it up as a racial gerrymander.

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[32] In *Miller v. Johnson*, *supra*, this Court noted that the plaintiffs had standing because they resided within the challenged district. To the extent that *Miller* stands for the proposition that mere proof of residency in the challenged districts establishes standing, then Texas requests that this Court reconsider that ruling.

Third, without proof of representational harm, courts would be forced to presume that an official elected from the district only represents the members of one racial group instead of the entire constituency in the district regardless of whether the facts show otherwise.

Here, there are six Plaintiffs: Vera, Thomas, Orcutt, Blum, Powers, and Chen. Chen does not reside in any of the districts at issue in this appeal; he resides in CD 25, Deposition of Ed Chen at 21-22, which the court below determined was not racially gerrymandered, and the record lacks evidence substantiating that he was the subject of a racial classification. Thus, he has no standing to complain about CDs 18, 29, and 30. *U. S. v. Hays*, *supra.*

Although the record shows that the remaining five Plaintiffs live in one of the three districts found by the trial court to be racial gerrymanders, it does not show the special representational harm that a racial gerrymander causes.

Blum and Powers reside in CD 18. Congresswoman Sheila Jackson Lee, an African-American female, represents CD 18. Powers said nothing about representational harm. His proffered testimony failed to show that Congresswoman Lee represents only the interests of the African Americans living in CD 18. Similarly, Blum said nothing about experiencing representational harm. Thus, they have failed to adduce evidence proving their standing in this matter.

Orcutt resides in CD 30. Congresswoman Eddie Bernice Johnson, an African-American female, represents the district. Orcutt complained that Rep. Johnson does not represent her because Johnson is an "ultraliberal"; Deposition of Pauline Orcutt at 22-23, and because Johnson supports President Clinton and does not have "conservative attitudes." *Id.* at 24. Orcutt stressed that Johnson's race is not the reason why some in the district feel disenfranchised. *Id.* at 26. In fact, Orcutt said that the reason she is not being adequately represented is that she is a Republican living in a Democratic district. *Id.* at 84-85. She, too, failed to show any representational harm.

Finally, Thomas and Vera reside in CD 29. Congressman Gene Green, an Anglo male, represents the district. Vera, who is an Hispanic male, made no reference in his testimony about representational harm. Thomas testified that Rep. Green was not an adequate representative because "he's a Democrat." Deposition of Barbara Thomas at 47. Moreover, she testified that either a Black or an Hispanic could represent her interests, but not a Democrat, *Id.* at 64. Finally, she testified that in her opinion CD 29 was an Anglo district, *id.* at 61-62, and that her concern about the use of race in redistricting was a theoretical one, *id.* at 69-70, because she did not feel discriminated against, *id.* at 70, and was not segregated. *Id.* at 71. In short, the record lacks any evidence that Rep. Green represents only the Hispanics in the district. Quite the contrary, Green won his congressional seat in this Hispanic opportunity district because of the overwhelming Anglo vote he received coupled with enough of the African-American vote to overcome his Hispanic challenger in the primary. Thus, the record evidence fails to establish standing for Vera and Thomas.

Since the record fails to show representational harm for any of the Plaintiffs, they have failed to show that they have standing to challenge any of the districts invalidated by the trial court. For this independent reason, the trial court's decision should be reversed.

## IV.
## CONCLUSION

For the reasons set out above, the State Defendants request that this Court reverse the decision of the trial court and render judgment that the Plaintiffs take nothing. In the alternative, the State Defendants request that this Court direct the trial court to dismiss the Plaintiffs' claim for lack of standing.

Respectfully submitted,

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